IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 9 OF 2007

Kennedy Cardozo,
son of late Benedit Cardozo,
aged 33 years,
residing at Guirdolim, Anthoi,
Chandor, Salcete, Goa. .... Petitioner

Versus

1. Casmiro D'Cunha,
son of Augustinho D'Cunha,
aged 34 years, residing at H. No. 121,
Tambiti, Maina Curtorim, Salcete, Goa.

2. State.
Through the Public Prosecutor, High Court. ... Respondents

Shri V. Rodrigues, Advocate for the Petitioner.
Shri Arun Bras De Sa, Advocate for Respondent No.1.
Ms. Winnie Coutinho, Public Prosecutor for Respondent No.2.

CORAM : N.A. BRITTO, J.

DATE : 26th APRIL, 2007

ORAL ORDER :

Heard learned Counsel on behalf of both the parties.

2. The short point raised in this revision application filed by the Petitioner (accused, for short) against the order dated 23/11/2006 of the learned Assistant Sessions Judge, confirming his conviction under Section 138 of the Negotiable Instruments Act, 1981 imposed by order dated 27/02/2006 of the learned J.M.F.C.,

Margao, is as regards limitation in the light of the explanation to Section 138 of said Act. In other words, it is the contention of the accused that the subject cheque dated 8/06/2002 for Rs. 3,60,000/- was given in payment of a debt which was time barred.

3. The explanation reads as follows:-

> "For the purposes of this section "debt or other liability" means a legally enforceable debt or other liability".

4. In order to dispose of this revision, some facts are required to be stated, which are otherwise not disputed.

5. The Respondent (Complainant, for short) had advanced to the accused on 15/02/1999 a sum of Rs. 3,60,000/- against execution of four hundis, of the same date, payable on demand. The Complainant having demanded the payment, the accused gave a cheque to the Complainant dated 10/04/2001 for the said sum of Rs. 3,60,000/-, which cheque when presented for payment and was dishonoured for insufficient funds. The Complainant, thereafter issued a legal notice dated 25/04/2001 which was received by the accused, but as per the Complainant the accused approached him and requested him six months' time to make the payment, promising the Complainant that he would make the payment alongwith interest at the rate of 18% from the date of the loan and requested the Complainant not to file any complaint. As per the Complainant, considering the relationship and friendship between the Complainant and the accused, the Complainant accepted the request of the accused on a condition that the accused would pay to the Complainant the said

sum of Rs. 3,60,000/- with interest at the rate of 18% per year, calculated from the date of extension of the loan amount. There is also no dispute that on 11/11/2001, the accused made a payment of Rs.25,000/- and again on 15/02/2002, the accused made another payment of Rs. 50,000/-.

6. The subject cheque dated 8/06/2002 was then issued by the accused to the Complainant in the sum of Rs. 3,60,000/- which when presented for payment was dishonoured on or about 13/06/2002, on account of the funds being insufficient. Thereafter, the Complainant issued a legal notice to the accused dated 18/06/2002, which the accused received on 5/07/2002 and as the accused failed to pay the said amount of Rs. 3,60,000/-, the Complainant filed the complaint on or about 7/08/2004. The Complainant was paid a sum of Rs. 1,00,000/- on 30/07/2002, prior to filing of the complaint. Likewise, there is also no dispute that after the filing of the complaint, the Complainant was paid a sum of Rs. 48,000/- on seven different dates between 5/01/2004 and 10/02/2005.

7. Admittedly, the loan was advanced to the accused on 15/02/1999 and the subject cheque was issued on 8/06/2002, beyond a period of three years and being so, a suit for recovery of the loan amount of Rs. 3,60,000/- would be barred under the provisions of Limitation Act, 1963.

8. On behalf of the Complainant, the period of limitation was sought to be saved by relying upon the first cheque given by the accused on 10/04/2001, which was

dishonoured and although the Complainant had sent a statutory notice demanding the notice, the Complainant had chosen not to prosecute the accused, and as stated by the Complainant at the request of the accused, because the accused had promised that he would make the payment with interest at the rate of 18% from 15/02/1999 within a period of six months. On behalf of the accused, it is contended, and in my view rightly, that issuance of the said cheque dated 10/04/2001, which was dishonoured could not have extended the period of limitation. On behalf of the Complainant, reliance has been placed on **Jiwanlal Achariya V/s Rameshwarlal Agarwalla *(AIR 1967 SC 1118),*** to support the contention that issuance of cheque itself is acknowledgment of payment. The Apex Court observed thus;

> A creditor may receive a bill or a cheque as a conditional payment of a pre-existing debt, i.e., as a payment conditional on the instrument being duly honoured on presentation. If the cheque is honoured, the date of the payment of the debt is the date when the cheque was delivered and not the date when it was honoured. For purposes of S. 20 of the Indian Limitation Act, 1908 also, the cheque is the payment and the date of the payment is the date of the delivery of the cheque. The cheque also serves as an acknowledgment of this payment.

This was a case where the pro note was executed on 4/2/1954 and on the same date a post dated cheque bearing the date 25/2/1954 was given by the defendant to the Plaintiff, the intention being that on being realised it would be credited towards part payment. It was realised after 25/2/1954 and was credited towards part payment the defendant himself having made an endorsement admitting this part payment and the Apex Court held that the purposes of the proviso to S. 20 of the Limitation Act the cheque was itself an acknowledgment of the payment in the hand-writing of the person giving the cheque and, therefore, fresh period of limitation began on

25/02/1954, which was the date of the post-dated cheque which was eventually honoured. However, it must be noted that, that case is quite distinguishable from the facts of this case, because in this case the cheque was not at all honoured. On behalf of the accused, reliance has been placed on a Division Bench Judgment of this Court in **Chintaman Dhundiraj V/s. Sadguru Narayan Maharaj Datta Sansthan and Others** ***(AIR 1956 Bombay 553),*** wherein the Division Bench has stated that merely giving of a cheque which is dishonoured cannot be regarded as acknowledgment of the liability and that it also cannot be regarded as part payment within the meaning of S. 20 of the said Limitation Act. This Court in **Mr. Narendra V. Kanekar V/s. The Bardez-Taluka Co-op. Housing Mortgage Society Ltd.,** by unreported judgment dated 20/04/2006 in ***Criminal Revision Application No. 3 of 2006*** has held thus;

> "Mere giving a cheque, without anything more, will not revive a barred debt, because cheque has to be given, as contemplated by the explanation in discharge of a legally enforceable debt. There is no doubt that in terms of the Indian Limitation Act, 1963, a signed acknowledgment of liability made in writing before the expiration of the period of limitation, is enough to start a fresh period of limitation. Likewise, when a debt has become barred by limitation, there is also Section 25(3) of the Contract Act, by which, a written promise to pay, furnishes a fresh cause of action. In other words, what clause (3) of Section 25 of the Indian Contract Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce payment by suit, and if the payment could be enforced by a suit, it means that it still has the character of legally enforceable debt as contemplated by the explanation below Section 138 of the Act."

In the light of the said two judgments of this Court, the cheque dated 10/04/2001, given by the accused to the Complainant and which was dishonoured could not extend the period of limitation.

9. The next question is whether the payments made by the accused of Rs. 25,000/- and Rs. 50,000/- on 11/11/2001 and 15/02/2002 respectively, could have extended the time. This question is also no longer res integra. On behalf of the accused reliance has been placed on the decision of Apex Court in **Sant Lal Mahton V/s Kamla Prasad and Others** ***(AIR (38) 1951 SC 477)***. In this context, it must be stated that the Complainant in his evidence before the trial Court has stated that he had issued receipts to the accused after he had received the said sums of Rs. 25,000/- and Rs. 50,000/-. The learned Assistant Sessions Judge has concluded that the said payments extended the period of limitation. The said receipts were not produced by the Complainant. Section 19 of the Limitation Act, 1963 deals with the effect of payment on account of debt or of interest on legacy. It further provides that;

> Where payment on account of debt or of interest on legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made;
>
> Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or any writing signed by, the person making the payment.
>
> *Explanation* - For the purposes of this Section, -
>
> (a) where mortgaged land is in possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;
>
> (b) "debt" does not include money payable under a decree or order of a Court.

The Complainant did not produce the receipts issued by him on account of the said two payments and one does not know whether the said receipts also carried an

acknowledgment signed by the accused. That is not the case of Complainant. It may be stated that for the applicability of Section 19 of the Limitation Act, 1963, two conditions are essential;

(1) the payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing, either in the hand-writing of payer himself or signed by him. It is the payment which really extends the period of limitation,

(2) the payment has got to be proved in a particular way and a written or signed acknowledgment is the only proof of payment and oral testimony is excluded unless there is acknowledgment in the required form, the payment itself is of no avail.

10. In this case, although the Complainant complies with the first condition, the Complainant does not comply with the second condition which requires that there should be an acknowledgment in writing by a person making the payment i.e. the accused. Section 19 of the Limitation Act, 1963, corresponded to Section 20 of the Limitation Act, 1908 and with reference thereto, the Apex Court in the case of **Sant Lal Mahton V/s Kamla Prasad and Others** ***(AIR (38) 1951 SC 477)***, on which the reliance has been placed on behalf of the accused, has stated that to claim exemption under Section 20, the plaintiff must be in a position to allege and prove not only that there was payment of interest or debt or part payment of the principal, but that such

payment had been acknowledged in writing in the manner contemplated by the Section. The ground of exemption is not complete without this second element and unless both these elements are proved to exist at the date of the filing of the plaint the suit would be held to be time barred. The said two payments which the Complainant states were acknowledged by him and not by the accused were insufficient to extend the period of limitation.

11. Faced with the above situation, on behalf of the Complainant it is submitted that the hundis executed by the accused were payable on demand and when the first demand was made the accused issued the first cheque dated 10/04/2001 and the subject cheque was thereafter issued on 8/06/2002 and being so, the subject cheque was issued within three years from the first cheque and therefore the debt was not time barred. On behalf of both the parties reference is made to Article 35 of the Limitation Act, 1963 which provides for *limitation of three years for filing a suit, from the date of the bill or note, in case the bill of exchange or promissory note is payable on demand and is not accompanied by any writing restraining or postponing the right to sue*. On behalf of the accused, my attention is drawn to Article 21 which provides *for a period of three years for a suit for recovery of the amount, from the date the loan is made i.e. to say for money lent under an agreement that it shall be payable on demand*. It is the Complainant's contention that in the case at hand, the hundis were accompanied by the first cheque dated 10/04/2001 and therefore article 35 would be inapplicable. I have already stated that the said cheque was not sufficient to extend the period of limitation. On behalf of the Complainant

learned Counsel has also not been able to point out any other article in the Limitation Act, 1963, which provides for limitation when a loan is advanced on a bill of exchange, which is accompanied by any writing. The facts of the case make it abundantly clear that the loan was advanced on 15/02/1999 against four hundis/bills of exchange, which were payable on demand and otherwise was not accompanied by any writing and the limitation period for filing the suit would be three years as provided for by Article 35 of the Limitation Act, 1963. The subject cheque was issued beyond the said period of three years, and therefore, in case the Complainant was unable to maintain a suit for recovery of the amount when the subject cheque was given, it is obvious that the cheque was given in payment of a debt, which was time barred.

12. In the above view of the matter, the revision deserves to succeed.

13. Consequently, the conviction and sentence imposed upon the accused by the learned J.M.F.C. and as confirmed by the learned Assistant Sessions Judge, deserves to be set aside and as a result, the complaint dismissed. The amount deposited by the accused pursuant to order dated 14/02/2007 shall be refunded to the accused.

N.A. BRITTO, J.

NH/-